IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.592 OF 2007

Mr.Yashwant Dalal .. Appellant
(Orig.Deft.No.8)

Versus

1. Mr.Swadesh Joshi
2. Mr.Mukund Purohit
3. The Estate Agents Association of India
4. Mr.Manmohan Goyal
4. Mr.Shreegopal Maheshwari
5. Mr.Mannath Balachandran
6. Mr.Atul Mathuradas Bhatia
7. Mr.Sanjay Damodar Shenoy
8. Mr.Manoj Nihlani
9. Mr.Harendra B. Pandya
10. Mr.Dinesh Sheth
11. Mr.Jakhubhai S.Gogri
12. Mr.Amit Vasa
13. Mr.Rajendra Kumar Jhirmirya
14. Mr.Ravi S.Bhinder
15. Mr.Amar Manjal
16. Mr.Jawahar Thakkar
17. Mr.Pravin Shah
18. Mr.Dharam F.Sharma
19. Mr.Ashwin M.Modi ..Respondents
(Respondent No.1-orig. Plaintiff and Respondent Nos.2 to 19 Original defendant Nos.1 to 7 & 9 to 19)

Shri Vinay A. Rathi for the Appellant
Shri R.D. Soni i/b. Uma Sharma for the Respondent Nos.1 and 2.

CORAM : S.R.SATHE,J.
DATED : 16/10/2007

ORAL ORDER :-

1. Heard both the learned Advocates at length.

2. Appeal heard finally at admission stage.

3. The Appellant-original defendant No.8 in S.C. Suit No.2450 of 2007 has preferred this appeal against the order passed in Notice of Motion whereby the Charity Commissioner Bombay was requested to appoint suitable person from his office to hold election of defendant No.1 Association within a period of 2 months and by way of interim arrangements officer from City Civil Court was appointed to take charge of the office of the defendant No.1 Association with immediate effect and defendant Nos.8,9,13,15,18 and 19 were directed to hand over the keys of the office of defendant No.1 Association. The Court also directed that on defendant's failure to hand over the keys the Court Officer to break open lock with police aid and parties to the suit were restrained from operating bank account of defendant No.1 which is in the Saraswat Bank, Fort Branch, Bombay. For the sake of convenience hereafter the parties shall be referred to as 'Plaintiff' and 'defendants'.

4. The brief facts giving rise to this appeal are as under :-

The defendant No.1 is an Association of Estate Agents registered under Societies Registration Act, 1860 as well as Bombay Public Trust Act, 1950.

According to plaintiffs, Plaintiff No.1 Mr.Swadesh Joshi and Defendant Nos. 2 to 10 and 12 to 17 are the elected members of the Managing Committee of defendant No.1 Association. However, the original defendant Nos.8 to 11 claimed to have replaced defendant Nos.2 to 6. The defendant Nos.11 and 14 to 17 are co-opted members of the managing committee. However, the claim of defendant Nos.2 to 5 is that they have replaced defendant Nos. 11 and 14 to 17.

5. According to Plaintiffs, defendant Nos.2 to 5 are the elected President, Vice President, Secretary and Treasurer respectively. However defendant Nos.8 to 11 claimed that they have been elected as President, Vice President, Secretary and Treasurer respectively.

6. Though, as per the Articles of Association of the defendant No.1, tenure of the Managing Committee was only for one year, no lawful elections were held and even Annual General Meeting was lastly held on 06/08/2001. As a result of all this, there was dispute between the members of the Association and the members were divided practically in two groups. It is alleged by the Plaintiffs that meeting of 15 members of the Association took place on 04/06/2007 to resolve dispute

and difference between two groups of the Managing committee. One laid by Mr.Manmohan Goyal and other group laid by Yashwant Dalal i.e. present Appellant-Original defendant No.8. In the said meeting, the members unanimously appointed Advocate Shri D.F. Sharma and Advocate Mr.Ashwin Modi i.e. present defendant Nos.18 and 19 respectively as arbitrators and mediators. Certain other terms and conditions were also agreed between the members of the said meeting. It is Plaintiff's case that the defendant Nos.8 to 11 refused to act as per the resolution passed in the meeting dated 04/06/2007. Hence, Plaintiffs filed the present suit and prayed for declaration as to who are the rightful, lawful President, Vice President, Secretary and Treasurer, whether defendant Nos.2 to 5 or defendant Nos.8 to 11. Plaintiffs also prayed for declaration that the agreement dated 04/06/2007 between Plaintiff No.1 and defendant Nos.2 to 7,8,9,11,12 and 13 to 15 is subsisting and prayed for permanent injunction restraining defendant Nos.8,9,12,13 and 15 from entering the office premises of the defendant No.1.

7. Plaintiffs also filed Notice of Motion directing defendant Nos.8,9,12,13 and 15 to restore the

Status quo ante as it existed on 04/06/2007 by removing themselves from the office of the defendant No.1 Association and handing over the keys to defendant No.19 i.e. arbitrator Ashwin Modi and restraining them from interfering with the management and the administration and accounts and funds of defendant No.1, unless re-elected to the Managing Committee of the defendant No.1 till the disposal of the suit.

8. The above mentioned Notice of Motion was served on the defendants on 02/07/2007 at night. On 03/07/2007, the learned Judge, City Civil Court Bombay heard arguments of the learned Advocates from both the sides and passed the above mentioned impugned order.

9. The original defendant No.8 has challenged the said order in the present appeal. In this appeal before me, Shri Rathi, learned Advocate for the Appellant-original defendant No.8 has urged four points. Firstly, he submitted that the learned Trial Judge did not give sufficient opportunity to the defendants to put forward their case and file reply and hurriedly passed order dated 03/07/2007. Secondly, he canvassed before me that the learned trial Judge did not consider the necessary points namely prima facie case and balance of

convenience and that the order passed by the learned Trial Judge is illegal. Thirdly, he submitted that the alleged resolution passed in the meeting dated 04/06/2007 is forged and fabricated. Lastly, the learned Trial Judge ought to have held that suit is bad for want of necessary permission from the Charity Commissioner as required under section-51 of the Bombay Public Trust Act. He therefore submitted that the appeal be allowed and the order passed by the Learned Trial Judge be set aside. As against this, Shri R.D.Soni, learned Advocate for the original Plaintiffs submitted that the suit is for specific performance of the resolution or agreement arrived at between members in the meeting dated 04/06/2007 and as such Civil Court has jurisdiction to try the present suit and the same is not barred by provisions of Section-51 of the Bombay Public Trust Act, 1950. Secondly, he canvassed before me that the present Appellant is in fact party to the resolution or agreement dated 04/06/2007 and he is not entitled to challenge the said resolution. Lastly, he submitted that in order to protect the interest of the Association the Court has passed the necessary order and there is no need to interfere with the discretionary relief granted to Plaintiffs.

10. From the perusal of the record, it is very clear that though notice was served on the defendant on 02/07/2007 no sufficient opportunity was given to them to file their reply and Notice of Motion is finally disposed of by the learned Trial Judge on 03/07/2007 only after hearing the arguments advanced by both the sides. Merely because technically there was no application filed by the defendants seeking time to file reply, one can not discard the grievance of the defendant in this behalf, particularly when it has been stated that time was sought to file reply. It is true that the Court has got every power to pass suitable order by way of an interim arrangements and protect the interest of both the parties till the application is heard. However, it seems that instead of doing so, the learned Trial Judge has disposed of the Notice of Motion finally.

11. It is an admitted fact that the last Annual General Meeting of the defendant No.1 Association has taken place in the year 2001. It is also not in dispute that though the election of Managing Committee is required to be held every year and certain norms have been fixed with regard to number of members to be co-opted in the Managing Committee, the said provisions of

articles of association have not been followed. Admittedly, there is dispute between members of the Managing Committee. There is dispute as to whether defendant Nos.8 to 11 are lawful office bearers or whether defendant Nos.2 to 5 are the lawful office bearers. In fact, with a view to resolve the said dispute meeting was held on 04/06/2007 and it does appear that members unanimously passed the resolution, copy of which is produced at Exh-A alongwith plaint at page-65 of the compilation and minutes of the meeting are at Page-106 of the compilation. From the perusal of the said minutes, it does appear that Advocate Sharma and Advocate Modi were appointed as arbitrator and mediator. What is more to be noted is that defendant No.8 i.e. present Appellant was a party to the said resolution or agreement. So, at least prima facie it can be said that now he is not entitled to challenge the said resolution or agreement. A feeble attempt at this stage, has been made to show that the said resolution is forged and fabricated. However, from the submissions made before me and even from the pleadings it is clear that signatures below the said original writing are not at all disputed. So, due weightage shall have to be given to the said resolution at this stage.

12. Much is made about the fact that defendant Nos.18 and 19 are the said alleged arbitrator and mediator. Admittedly, they had initially taken part as Advocates representing some members but that factor has in fact no significance, once it is accepted that by resolution dated 04/06/2007 Advocate Sharma and Advocate Modi were appointed as Arbitrators and Mediators.

13. Learned Advocate for the Appellant-original defendant No.8 strenuously argued before me that in the instant case, the Court has granted relief which was in fact not claimed either in the plaint or in Notice of Motion and as such the said order is illegal. It is true that strictly speaking relief granted by the learned Trial Judge is different from the relief claimed in the Notice of Motion. However, it must be noted that as there was dispute between Plaintiff and defendants with regard to the appointment of arbitrators and mediators, with a view to make some independent arrangement till disposal of the suit, the learned Trial Judge has in fact appointed an independent persons viz. officer from the City Civil Court to take charge of the association. So, merely

because he has done so it can not be said that the said order is illegal.

14. Learned Advocate for the Appellant-original defendant No.8 argued before me that in the instant case suit is bad for want of permission under section-51 of the Bombay Public Trust Act. As against this, Shri Soni, learned Advocate for the original Plaintiffs submitted that the present suit is for specific performance of the agreement dated 04/06/2007 and as such there is no question of application of Section-50 and 51 of the Bombay Public Trust Act, 1950. In order to find out whether there is any substance in the arguments advanced by the learned Advocate for the Appellant-original defendant No.8 it would be worthwhile to see what Section-50 and Section-51 of the Bombay Public Trust Act,1950 says :-

> **“50. Suit by or against or relating to public trusts or trustees or others:**
>
> **In any case --**
>
> **(i) where it is alleged that there is a breach of a public trust, negligence, misapplication or misconduct on the part of a trustee or trustees.**
>
> **(ii) where a direction or decree is required to recover the possession of or to follow a property belonging or alleged to be belonging to a public trust or the proceeds thereof or for an account of such**

property or proceeds from a trustee, ex-trustee, alienee, trespassers or any other person including a person holding adversely to the public trust but not a tenant or licensee,

(iii) where the direction of the Court is deemed necessary for the administration of any public trust, or

(iv) for any declaration or injunction in favour of or against a public trust or trustee or trustees or beneficiary thereof,

the Charity Commissioner after making such enquiry as he thinks necessary, or two or more persons having an interest in case the suit is under sub-clauses (i) to (iii), or one or more such persons in case the suit is under sub-clause (iv) having obtained the consent in writing of the Charity Commissioner as provided in section 51 may institute a suit whether contentious or not in the Court within the local limits of whose jurisdiction the whole or part of the subject-matter of the trust is situte, to obtain a decree for any of the following reliefs :-

(a) an order for the recovery of the possession of such property or proceeds thereof ;

(b) the removal of any trustee or manager ;

(c) the appointment of a new trustee or manager ;

(d) vesting any property in a trustee ;

(e) a direction for taking accounts and making certain enquiries ;

(f) an order directing the trustees or others to pay to the trust the loss caused to the same by their breach of trust, negligence, misapplication, misconduct or

wilful default ;

(g) a declaration as to what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;

(h) a direction to apply the trust property or its income cypres on the lines of section 56 if this relief is claimed along with any other relief mentioned in the section;

(i) a direction authorising the whole or any part of the trust property to be let, sold, mortgaged or exchanged or in any manner alienated on such terms and conditions as the court may deem necessary ;

(j) the settlement of a scheme, or variations or alterations in a scheme already settled.

(k) an order for amalgamation of two or more trusts by framing a common scheme for the same;

(l) an order for winding up of any trust and applying the funds for other charitable purposes;

(m) an order for handing over of one trust to the trustees for some other trust and deregistering such trust;

(n) an order exhonerating the trustees from technical breaches, etc.

(o) an order varying, altering, amending or superseding any instrument of trust ;

(p) declaration or denying any right in favaour of or against a public trust or trustee or trustees or beneficiary thereof and issuing injunctions in appropriate cases; or

(q) granting any other relief as the nature of the case may require which would be a condition precedent to or consequential to any of the aforesaid relief or is necessary in the interest of the trust :

Provided that no suit claiming any of the reliefs specified in this section shall be instituted in respect of any public trust, except in conformity with the provisions thereof :"

"51. Consent of Charity Commissioner for institution of suit.

(1) If the persons having an interest in any public trust intend to file a suit of the nature specified in section 50, they shall apply to the Charity Commissioner in writing for his consent. {If the Charity Commissioner after hearing the parties and making such enquiries (if any) as he thinks fit is satisfied that there is a prima facie case, he} may within a period of six months from the date on which the application is made, grant or refuse his consent to the institution of such suit. The order of the Charity Commissioner refusing his consent shall be in writing and shall state the reasons for the refusal.

(2) If the Charity Commissioner refuses his consent to the institution of the suit under sub-section (1) the persons applying for such consent may file an appeal to the {Maharashtra Revenue Tribunal constituted under the Bombay Revenue Tribunal Act, 1957} in the manner provided by this Act.

(3) In every suit filed by persons having interest in any trust under section 50, the Charity Commissioner shall be a necessary party."

15. It is needless to say that for application of Section-50 of the Bombay Public Trust Act, all the essential ingredients of the said sections must be fulfilled. The question whether Section-50 applies or not depends upon the prayer in the plaint. Though, it is tried to be argued that this is a suit for specific performance of the agreement dated 04/06/2007, there is no specific prayer clause in the plaint which says that defendant Nos.8,9,12,13 and 15 be directed to perform as per the agreement dated 04/06/2007. It is needless to say that while determining the nature of the suit one has to read the plaint as a whole and find out as to what in subsistence Plaintiff has claimed. Applying this test if we see averments in the plaint as well as the documents, reference to which is made in the plaint, it is very clear that suit is in fact for the administration of public trust. It is to determine as to who should manage the said Trust at present and who should hold the property of the Trust at present. Thus, prima facie it appears to me that the provisions of Section-50 and Section-51 of the Bombay Public Trust Act are applicable and there is some substance in the arguments advanced by the learned Advocate for the Appellant-original defendant No.8 in this behalf. However, admittedly the suit is filed without such

permission required under Section-51 of the Bombay Public Trust Act.

16. From the perusal of the order passed by the learned Trial Judge, it is very clear that there is nothing on record to show that the learned Trial Judge has considered this aspect. As mentioned earlier the learned Trial Judge has also not given sufficient opportunity to the defendants to file their reply and put forward their exact grievance and has disposed of the Notice of Motion hurriedly. It is therefore, necessary to interfere with the said order. Hence, I pass the following order :-

O R D E R

The Appeal is partly allowed.

The order passed by the learned Trial Judge on 03/07/2007 in Notice of Motion is set aside.

The defendants to file their say if any to the Notice of Motion before the Trial Court on 23/10/2007. The Trial Court to rehear the Notice of Motion and decided the same on merits according to law as expeditiously as possible and in any event by 09/11/2007 without getting influenced by any of the observations made by this Court while disposing of this appeal. Till the disposal of the Notice of Motion

existing Managing Committee to follow the restrictions on expenditure as mentioned in the minutes of the meeting dated 04/06/2007 i.e. it may incur expenses upto Rs.50,000/- only. If expenses more than the said amount are to be incurred the said Managing Committee to obtain prior permission of the Trial Court. The existing Managing Committee not to take any major policy decisions till the disposal of Notice of Motion.

Under the circumstances of the case parties to bear their own costs of this appeal.

Parties to act on authenticated copy of this order.

(S.R.SATHE,J.)